

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DENISE McKEOWN, ROBERT LUTTS
Plaintiffs

vs.

ADVEST, INC., KAREN M. SUGHRUE,
et al.
Defendants

Civil Action No. 05-10176-RGS

CONSOLIDATED WITH

T. ROWE PRICE TAX-FREE HIGH
YIELD FUND, INC., et al.
Plaintiffs

vs.

ADVEST, INC., KAREN M. SUGHRUE,
et al.
Defendants

Civil Action No. 04-11667-RGS

**PLAINTIFFS' MOTION TO STRIKE IN SUPPORT OF THEIR
OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

Plaintiffs, Denise McKeown and Robert Lutts, move to strike the Affidavit of Karen M. Sughrue, Exhibit 4 to the Memorandum in Support of Bradford Defendants' Motion to Dismiss and Paragraphs 11, 19 and 20 of the Bradford Defendants' Motion to Dismiss the Amended Complaint (as well as Argument I.A.4 of their memorandum in support of said motion) on the grounds that they are not properly before the Court in its consideration of Defendants' Motions to Dismiss. In support thereof, Plaintiffs state as follows:

1. In ruling on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) the Court should only consider the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice. *Banco Santander de Puerto Rico v. Lopez-Stubbe (In re Colonial Mortgage Bankers, Corp.)*, 324 F.3d 12, 16 (1st Cir. 2003).

2. In support of their motion to dismiss the Bradford Defendants have filed an affidavit of Karen M. Sughrue and an excerpt from the book *Liberal Arts College: Surviving, Thriving or Endangered?*, by David W. Breneman (Exhibit 4 to the Memorandum In Support Of Bradford Defendants' Motion to Dismiss). These materials are not the type that may be considered on a motion to dismiss and should be stricken from the record. Paragraphs 19 and 20 of their Motion to Dismiss are based on the Sughrue Affidavit.

3. Paragraph 11 of the Bradford Defendants' Motion to Dismiss the Amended Complaint and Argument I.A.4 of their memorandum in support is entitled "Count IV Is Barred By The Four Year Statute of Repose".

4. Each of the Bradford Defendants have executed the Standstill and Tolling Agreement and Second Standstill and Tolling Agreement to which the Plaintiffs are beneficiaries. Copies of the agreements are attached as Exhibits 1 and 2 of the institutional plaintiffs' Opposition to the Motion to Dismiss. In paragraph 1 of each of the agreements, the Bradford Defendants agreed to waive their rights to enforce statutes of limitation and statutes of repose against the Plaintiffs in exchange for Plaintiffs' dismissal of an earlier lawsuit and Plaintiffs' agreement not to file any lawsuit against the Bradford Defendants for a specified period of time. In addition, paragraph 1 of each agreement contains the following provision:

Each Potential Defendant hereby agrees and acknowledges that he, she or it shall not plead or raise and is estopped from pleading or raising the period of time during the Tolling Period as part of a defense of bar based upon any Limitations Period with respect to any Claim.

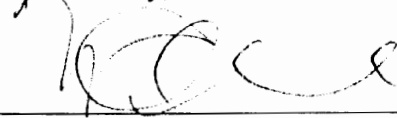
5. Argument I.A.4 violates the Bradford Defendants' agreement not to plead or raise any statute of limitations or statute of repose against the Plaintiffs claims. Plaintiffs are entitled to specific performance of the agreement the Bradford Defendants have breached, which is best accomplished by striking the offending argument.

WHEREFORE, for the reasons set forth above, this Court should strike:

- (a) The Affidavit of Karen M. Sughrue and paragraphs 19 and 20 of the Bradford Defendants Motion to Dismiss;
- (b) Exhibit 4 to the Memorandum in Support of Bradford Defendants' Motion to Dismiss; and
- (c) Paragraph 11 of the Bradford Defendants' Motion to Dismiss the Amended Complaint and Argument I.A.4 of the memorandum in support of said motion.

DENISE McKEOWN, ROBERT LUTTS

By their attorney,



William A. Sheridan, Esq., BBO#: 458140
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(617) 720-2700

Date: May 31, 2005

CERTIFICATE OF SERVICE

I, William A. Sheridan, hereby certify that I have served, a copy of

**Plaintiffs' Motion to Strike in Support of Their Opposition to Defendants'
Motions to Dismiss**

by mailing same to:

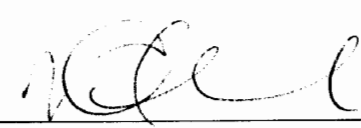
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